No. 04-522

Supreme Court, U.S.
FILED
DEC 15 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITEDHEALTH GROUP, INC., f.k.a. United HealthCare Corporation, UNITEDHEALTHCARE, INC., HUMANA INC., HUMANA HEALTH PLAN, INC., FOUNDATION HEALTH SYSTEMS, INC., n.k.a. Health Net, Inc., PACIFICARE HEALTH SYSTEMS, INC., PACIFICARE OPERATIONS, INC., THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, WELLPOINT HEALTH NETWORKS INC.,

Petitioners,

v.

LEONARD J. KLAY, M.D., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EDWARD SOTO
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave., 12th Floor
Miami, FL 33131
(305) 577-3177

GREGORY S. COLEMAN
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Ste. 4140
Austin, TX 78759
(512) 349-1930

Counsel for Petitioners

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

JAMES W. QUINN
JEFFREY S. KLEIN
NICHOLAS J. PAPPAS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Ave.
New York, NY 10153
(212) 310-8000

WILLIAM E. GRAUER
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, CA 92121
(858) 550-6024

MICHAEL NACHWALTER
ROBERT D. W. LANDON, III
KENNY NACHWALTER
SEYMOUR ARNOLD
CRITCHLOW & SPECTOR, P.A.
201 S. Biscayne Blvd., Ste. 1100
Miami, FL 33131
(305) 373-1000

K. LEE BLALACK, II
BRIAN P. BROOKS
MATTHEW D. ROBERTS
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, DC 20006
(202) 383-5300

EDWARD M. CRANE
R. RYAN STOLL
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
333 W. Wacker Dr., Ste. 2100
Chicago, IL 60606
(312) 407-0700

JOHN D. ALDOCK
RICHARD M. WYNER
MARK S. RAFFMAN
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

DANIEL A. CASEY
KIRKPATRICK & LOCKHART LLP
201 South Biscayne Blvd.
Miami, FL 33131
(305) 539-3324

STAN BLUMENFELD
O'MELVENY & MYERS LLP
400 South Hope St.
Los Angeles, CA 90071
(213) 430-6000

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ARGUMENT

The Eleventh Circuit's application of loose standards to affirm certification of a sprawling class that includes nearly every physician in the United States and claims involving tens of billions of physician-patient interactions has deepened the disagreement among the courts of appeals on two important and recurring questions. The Court should resolve the conflicts by granting the petition and confirming that (1)

Rule 23 requires courts to probe beyond the allegations of the complaint and rigorously analyze the evidence to ensure actual conformance with its certification standards and (2) Rule 23(b)(3)'s requirement that common issues must predominate cannot be met in a nonsecurities fraud case in which individual reliance is disputed.

I. IN CONFLICT WITH THOSE CIRCUITS THAT REQUIRE A SEARCHING REVIEW OF THE EVIDENTIARY RECORD, THE ELEVENTH CIRCUIT RELIED EXCLUSIVELY ON PLAINTIFFS' ALLEGATIONS.

This case squarely presents the important and recurring question whether the standard for certifying a class under FED. R. CIV. P. 23 requires a court to go beyond the pleadings and conduct a rigorous analysis of the evidentiary record. Respondents assert that the district court based its certification decision on evidence, BIO 14, but petitioners seek review of the Eleventh Circuit's decision, which adopted an approach to Rule 23 that excuses a district court from considering evidence.

The court of appeals made unmistakably clear that its commonality and predominance analysis turned solely on respondents' allegations of a common conspiracy involving uniform representations and reliance. The court expressly stated that, "in determining whether individual or collective issues predominate," it would consider only the "issues arising from the *allegations* contained in the complaint and the defenses raised against them." Pet. App. 56a n.7 (emphasis added). Consistent with that statement, the court addressed none of the evidence presented in the district court demonstrating that trial would involve numerous individualized issues concerning representation and reliance. Indeed, the court of appeals did not discuss the evidence at all. *See* Pet. App. 58a-59a, 62a-64a. The court of appeals further made its rejection of an evidentiary review explicit by its

distinction of *Simon* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880 (CA5 1973). *See* Pet. App. 62a (distinguishing *Simon*, in which the plaintiff failed "to *prove* any standardized representations," from this case based on what "plaintiffs *allege*" (emphasis added)). In glossing over the individualized issues that destroy the predominance of common issues, the court went so far as to recast respondents' allegations in the most generic terms possible: that "a variety of specific communications . . . all conveyed essentially the same message—that the defendants would honestly pay physicians the amounts to which they were entitled." *Id.*

Because the Eleventh Circuit's approach assumes away the difficulties with classwide treatment, this case presents the fundamental conflict between the circuits in stark relief. That core conflict arises from the divergent manner in which the circuits on each side of the split have reconciled the "rigorous analysis" mandated by *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 161 (1982), with the Court's holding that district courts deciding class certification should not "conduct a preliminary inquiry into the merits of a suit." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). The Eleventh Circuit has now placed itself on the side of the split with those courts of appeals that perceive the "rigorous" Rule 23 analysis as involving no more than a careful (at best) review of the allegations in plaintiffs' pleadings. *See Caridad* v. *Metro-North Commuter R.R.*, 191 F.3d 283, 293 (CA2 1999) ("[A] weighing of the evidence [on commonality] is not appropriate at this stage in the litigation."); *J.B. ex rel. Hart* v. *Valdez*, 186 F.3d 1280, 1290 n.7 (CA10 1999) ("[W]hen deciding a motion for class certification, the district court should accept the allegations contained in the complaint as true."); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (CA9 1982) ("[I]n determining whether to

certify the class, the district court is bound to take the substantive allegations of the complaint as true.").[1]

Under the approach endorsed by the Second, Ninth, Tenth, and Eleventh Circuits, the Rule 23(b)(3) predominance inquiry becomes nothing more than a heightened pleading standard that plaintiffs can meet with artfully crafted allegations. In contrast and in conflict, the First, Third, Fourth, Fifth, and Seventh Circuits correctly hold that the required rigorous analysis includes a searching inquiry into the evidence as to whether the Rule 23 factors are satisfied. *E.g.*, *Tardiff* v. *Knox County*, 365 F.3d 1, 4-5 (CA1 2004) ("[I]n our view a court has the power to test disputed premises early on."); *Gariety* v. *Grant Thornton, LLP*, 368 F.3d 356, 365 (CA4 2004) ("*Eisen* . . . does not require a court to accept plaintiffs' pleadings when assessing whether a class should be certified."); *Sandwich Chef of Tex., Inc.* v. *Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (CA5 2003) ("Going beyond the pleadings is necessary."); *Johnston* v. *HBO Film Mgmt., Inc.*, 265 F.3d 178, 189 (CA3 2001) (holding that it was "necessary[] for the district court to examine the factual record underlying plaintiffs' allegations in making its certification decision"); *Szabo* v. *Bridgeport*

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[1] Respondents erroneously suggest that the conflict analysis depends on "Second and Ninth Circuit cases that were decided before *Falcon*." BIO 10 n.7. In fact, *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* was decided five months after *Falcon*, and the only pre-*Falcon* cases respondents identify were reaffirmed by their respective circuits in post-*Falcon* decisions. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d, at 1342 (following *Blackie* v. *Barrack*, 524 F.2d 891, 901 n.7 (CA9 1975)); *compare Caridad*, 191 F.3d, at 293 (prohibiting weighing of the evidence regarding commonality), *with Shelter Realty Corp.* v. *Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (CA2 1978) ("[I]t is proper to accept the complaint allegations as true in a class certification motion."). Respondents do not even address the Second Circuit's post-*Falcon* holding in *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (CA2 2001) (applying *Caridad*).

Machs., Inc., 249 F.3d 672, 677 (CA7 2001) (holding that "nothing . . . prevents the district court from looking beneath the surface of a complaint" to conduct the Rule 23 inquiries).

Respondents do not even attempt to reconcile those holdings with the Eleventh Circuit's misapplication of the rule in this case or the holdings of the other circuits on the Eleventh Circuit's side of the split.[2] Instead they deny, against all the accumulated precedent to the contrary, that a split exists at all. The courts of appeals themselves recognize what respondents refuse to—that the disagreement among the circuits on the Rule 23 standard is real and deep. *See Tardiff*, 365 F.3d, at 5 n.5.

To support their assessment of the precedents, respondents attempt to group the Eleventh Circuit with the First, Third, Fourth, Fifth, and Seventh Circuits—which advocate going behind the pleadings in a way the Eleventh Circuit in

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[2] The importance of the Court's attention to this issue is magnified by the virtually identical conflict among state courts, most of which look to federal decisional law as persuasive in applying state class action rules that are similar to federal Rule 23. *Compare, e.g.*, *Dragon* v. *Vanguard Indus.*, 89 P.3d 908, 912 (Kan. 2004) (rejecting the argument "that the trial court must accept the class allegations as true and not inquire into the merits of the class facts"); *Crow* v. *Citicorp Acceptance Co.*, 354 S.E.2d 459, 465 (N.C. 1987) (noting that, although "the plaintiffs properly alleged the existence of a class . . . the plaintiffs also will be required to demonstrate the actual existence of the class"); *Schwendeman* v. *USAA Cas. Ins. Co.*, 65 P.3d 1, 21 n.34 (Wash. Ct. App. 2003) ("[I]t is proper for the court to consider all the evidence in the record . . . relevant to the issue of whether the requirements of CR 23 were met."), *with, e.g.*, *Collins* v. *Anthem Health Plans, Inc.*, 836 A.2d 1124, 1134 (Conn. 2003) ("In determining whether to certify the class, a [trial] court is bound to take the substantive allegations of the complaint as true." (alteration in original)); *Philip Morris Inc.* v. *Angeletti*, 752 A.2d 200, 220 (Md. 2000) ("A court should accept the putative class representative plaintiffs' allegations as true in making its decision on class certification."); *Delgozzo* v. *Kenny*, 628 A.2d 1080, 1086 (N.J. Super. Ct. App. Div. 1993) ("The court is bound to take the substantive allegations of the complaint as true.").

this case plainly did not—by citing *earlier* Eleventh Circuit decisions and ignoring that court's emphatic movement in this case to an approach that accepts class proponents' pleadings at face value. That attempt fails. Respondents rely on *Rutstein* v. *Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (CA11 2000), and *Love* v. *Turlington*, 733 F.2d 1562 (CA11 1984), both of which predate (*Love* by twenty years) the Eleventh Circuit's Rule 23 analysis in this case. To the extent, if any, *Rutstein* and *Love* accord with the jurisprudence of those circuits that require an inquiry beyond the pleadings, the Eleventh Circuit has now departed from that precedent.[3] The court of appeals expressly distinguished this case from *Rutstein*. Pet. App. 60a-61a. Indeed, *Rutstein* followed *Castano* v. *American Tobacco Co.*, 84 F.3d 734 (CA5 1996), *see Rutstein*, 211 F.3d, at 1234, which the court of appeals, at least in part, expressly repudiated. Pet. App. 62a.

II. THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THOSE CIRCUITS HOLDING THAT FRAUD CLAIMS IN WHICH INDIVIDUAL RELIANCE IS IN DISPUTE ARE NOT SUITABLE FOR CLASS TREATMENT.

This case also presents the ripe split over whether nonsecurities fraud cases in which individual reliance is at issue are suitable for class treatment. The court of appeals correctly recognized that each plaintiff in respondents' putative fraud class must demonstrate individual, actual reliance on the alleged representations, Pet. App. 61a, yet incongruously suggested that this "individual" reliance could be inferred on a classwide basis from a representation that the court redefined to be uniform. The court of appeals extrapolated from *Kirkpatrick* v. *J.C. Bradford & Co.*, 827 F.2d 718 (CA11 1987), in which the Eleventh Circuit

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[3] Respondents' own statistics suggest that, at least since 2002, the Eleventh Circuit has been more likely to uphold class certifications than it was previously. *See* BIO 16.

previously limited a presumption of reliance to claims that "a security could not have been issued but for a fraudulent scheme," *id.*, at 723, to expansively conclude that "circumstantial evidence" "could lead a reasonable factfinder to conclude . . . that each individual plaintiff relied on the defendants' representations." Pet. App. 63a.

But the predominance analysis must reach both the claims and defenses, and a plaintiff's asserted ability to prove reliance by circumstantial evidence cannot overcome a defendant's due process right to negate the inference of reliance with respect to individual class members. *Cf. Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997) (explaining that Rule 23 must be applied in a manner "properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right'"). If the jury in this case will be permitted to infer, from the allegedly uniform representations, that each of the approximately 600,000 physicians in the class individually relied on the alleged representations with respect to each of the tens of billions of transactions at issue, then petitioners must be afforded the right to rebut that inference by presenting evidence of nonreliance with respect to each of those individual class members. *See id.*, at 623 & n.18 (noting the relevance to the Rule 23 inquiry of available substantive defenses); *Sandwich Chef*, 319 F.3d, at 220 ("Defendants are entitled to attempt to undercut this proof [of reliance] with evidence."). As illustrated by the testimony of the named plaintiffs disavowing their individual reliance, a classwide inference of reliance can be rebutted by individualized proof. *See* Pet. 7 (collecting record citations); *cf. Sandwich Chef*, 319 F.3d, at 216 & n.7 (holding that individual issues predominated based, in part, on defendants' evidence demonstrating lack of reliance on alleged misrepresentations). There has been no demonstration that similar inquiries can be manageably conducted with regard to each of the more than half a million class members in a way that protects

petitioners' substantive rights to defend against respondents' fraud claims, and, even if they could be managed, those individualized inquiries would necessarily predominate over any common issues that might exist.

The Eleventh Circuit has thus placed itself on the wrong side of the clear split between circuits that permit classwide determinations when individualized issues of reliance are in dispute (including the Third, Seventh, and Ninth) and those recognizing that, when individualized reliance issues are in dispute, those inquiries will necessarily predominate in any fraud claim (the Second, Fourth, Fifth, Sixth, and Eight Circuits). *Compare, e.g.*, *Gunnells* v. *Healthplan Servs., Inc.*, 348 F.3d 417, 434-38 (CA4 2003) (holding that, in a nonsecurities-fraud case, in which no presumption was available, a class action "simply [could not] satisfy Rule 23's predominance and commonality requirements"); *Sandwich Chef*, 319 F.3d, at 211 ("Fraud actions that require proof of individual reliance cannot be certified as . . . class actions."); *Moore* v. *PaineWebber, Inc.*, 306 F.3d 1247, 1253 (CA2 2002) (holding that fraud claims based on individualized representations are not appropriate subjects for class certification); *Stout* v. *J.D. Byrider*, 228 F.3d 709, 718 (CA6 2000); *Castano*, 84 F.3d, at 745; *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 953 (CA8 1994), *with, e.g.*, *Poulos* v. *Caesars World, Inc.*, 379 F.3d 654, 668 (CA9 2004) (indicating that reliance can, in some nonsecurities-fraud cases, be proved on a classwide basis by circumstantial evidence); *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 663 (CA7 2004) (expressing disagreement with *Sandwich Chef*), *pet. for cert. filed*, 73 U.S.L.W. 3259 (Oct. 14, 2004) (No. 04-518); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 315 (CA3 1998) (explaining that "the presence of individual [reliance] questions does not *per se* rule out a finding of predominance").

Respondents' assertion that the court of appeals followed the same rule applied by the Fifth Circuit in *Castano*, BIO 19

& n.13, simply ignores the court of appeals's frank acknowledgement that it was consciously diverging from the Fifth Circuit on whether predominance can ever be satisfied when individual reliance is at issue. The court of appeals expressly disagreed with the Fifth Circuit's holding in *Castano* that "a fraud class action cannot be certified when individual reliance will be an issue," calling it "a misinterpretation of *Simon*." Pet. App. 62a. The deepening of the rift between the circuits caused by the court of appeals's holding in this case is both real and deliberate.

III. The Court Should Resolve These Conflicts by Requiring a Genuinely Rigorous Analysis of the Evidence and Whether Classwide Inferences Compromise Substantive Rights.

The Court should restore uniformity to class-certification decisions by resolving the conflicts and clarifying that Rule 23 requires a rigorous analysis going beyond the pleadings to determine if class proponents can demonstrate actual conformance with its requirements and that individualized reliance issues that are genuinely in dispute make classwide determinations unfeasible and improper. To avoid the significant social costs of imprudent class certifications—including inordinate pressure to settle unmeritorious claims—the courts of appeals for all circuits must require district courts to apply a class-certification analysis with teeth. The importance of the Court's resolving the conflicts is underscored by the interest expressed by *amici curiae* the Blue Cross and Blue Shield Association, the Chamber of Commerce of the United States, and Exxon Mobil Corporation. The Court should disapprove the precedent of those courts of appeals that permit class-action proponents to circumvent actual conformance with Rule 23 through artful pleading and unjustifiable presumptions.

CONCLUSION

The court of appeals's decision in this case raises two important and related issues under Rule 23 on which the courts of appeals are sharply divided. The Court should grant the petition for a writ of certiorari and resolve those disagreements among the courts of appeals by reversing the class certification in this case.

Respectfully submitted,

EDWARD SOTO
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave., 12th Floor
Miami, FL 33131
(305) 577-3177

GREGORY S. COLEMAN
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
8911 Capital of Texas Hwy.
Ste. 4140
Austin, TX 78759
(512) 349-1930

JAMES W. QUINN
JEFFREY S. KLEIN
NICHOLAS J. PAPPAS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Ave.
New York, NY 10153
(212) 310-8000

WILLIAM E. GRAUER
COOLEY GODWARD LLP
4401 Eastgate Mall
San Diego, CA 92121
(858) 550-6024

MICHAEL NACHWALTER
ROBERT D. W. LANDON, III
KENNY NACHWALTER
SEYMOUR ARNOLD
CRITCHLOW & SPECTOR, P.A.
201 S. Biscayne Blvd., Ste. 1100
Miami, FL 33131
(305) 373-1000

K. LEE BLALACK, II
BRIAN P. BROOKS
MATTHEW D. ROBERTS
O'MELVENY & MYERS LLP
1625 Eye St., N.W.
Washington, DC 20006
(202) 383-5300

EDWARD M. CRANE
R. RYAN STOLL
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM, LLP
333 W. Wacker Dr., Ste. 2100
Chicago, IL 60606
(312) 407-0700

DANIEL A. CASEY
KIRKPATRICK & LOCKHART LLP
201 South Biscayne Blvd.
Miami, FL 33131
(305) 539-3324

JOHN D. ALDOCK
RICHARD M. WYNER
MARK S. RAFFMAN
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

STAN BLUMENFELD
O'MELVENY & MYERS LLP
400 South Hope St.
Los Angeles, CA 90071
(213) 430-6000

Counsel for Petitioners